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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY SPRADLIN,

Defendant and Appellant.

H045622

(Monterey County

Super. Ct. No. SS170143)

A jury convicted Jeffrey Spradlin, an inmate at Salinas Valley State Prison, of custodial possession of a weapon. After a bifurcated bench trial on the prior felony conviction allegations, the court found them to be true. The trial court sentenced Spradlin to 25 years to life and imposed restitution fines and fees.

We appointed counsel to represent Spradlin on appeal. Appellate counsel filed an opening brief stating the case and the facts but raising no specific legal issues. Counsel declared that he notified Spradlin of counsel's intention to request independent review under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and of Spradlin's right to file written argument on his own behalf. We also notified Spradlin of his right to submit written argument on his own behalf within 30 days. That period has elapsed, and we have not received any communication from Spradlin in response to our notification.

After independent review of the record, we requested supplemental briefing as to whether the trial court erred in its imposition of restitution fines and fees, in light of *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), without having first ascertained whether Spradlin had an ability to pay. Upon receipt and review of the parties' supplemental briefs, we conclude that defense counsel's failure to object to the imposition of these fines and fees at sentencing rendered any claim of error unpreserved for appellate review. We therefore affirm the judgment.

I. FACTS AND PROCEDURAL BACKGROUND

In November 2016, Spradlin was an inmate at Salinas Valley State Prison. Prison staff searched Spradlin while he was on the way from his cell to a recreation yard. Spradlin was holding a baseball hat and other clothing as he walked to the yard. When Spradlin passed through a metal detector, the device indicated Spradlin possessed something made of metal. Correctional Officer Peffley conducted a pat-down search of Spradlin and noticed a string attached to the front waistband area of Spradlin's boxer shorts. The string hung down toward Spradlin's genitals and rectum. Peffley handcuffed Spradlin and searched him more thoroughly.

The search revealed that the string was attached to what Officer Peffley described as an "inmate-manufactured weapons handle" secreted between Spradlin's buttocks. The handle was made of tightly folded paper wrapped with masking tape. The handle had a slot in it, but no metal was found. A subsequent search of Spradlin's hat revealed an "X-Acto" razor blade concealed in a Velcro strap. The blade fit into the slot in the handle. When inserted into the handle, the blade stuck out about one-half inch. Peffley characterized the handle and razor blade as a slashing weapon that could cause serious bodily harm, and Peffley opined that the weapon was made by an inmate.

Spradlin was charged by information with custodial possession of a weapon (a sharp instrument/dirk or dagger) (Pen. Code, § 4502, subd. (a)¹). The information also alleged that Spradlin personally used a dangerous and deadly weapon (§ 969f, subd. (a)), and that Spradlin had five prior serious and/or violent felony “strike” convictions (§§ 667, subd. (d); 667.5, subd. (c), 1170.12, subd. (c)(2), 1192.7, subd. (c)).

Spradlin and the People waived their right to a jury trial on the truth of the prior conviction allegations. A jury heard evidence presented by the prosecution and convicted Spradlin on count 1.² Following a bench trial, the trial court found the prior felony conviction allegations to be true.

Spradlin waived his right to a presentence report and declined to pursue sentencing relief under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

The trial court sentenced Spradlin to the mandatory minimum sentence of 25 years to life in prison, consecutive to any other term that Spradlin was already serving. Because he was already in custody serving a separate offense when he committed the instant offense, Spradlin did not earn any presentence confinement credit. The trial court imposed the minimum \$300 restitution fine under section 1202.4, subdivision (b), and imposed and suspended a \$300 parole revocation restitution fine under section 1202.45. Spradlin was ordered to pay a \$40 court security fee under section 1465.8, and a \$30 criminal conviction assessment under Government Code section 70373. Spradlin’s trial counsel neither objected to the imposition of the fines and fees nor requested a hearing to determine Spradlin’s ability to pay them. Spradlin filed a timely notice of appeal.

¹ Unspecified statutory references are to the Penal Code.

² During the trial, the prosecutor moved to strike the allegation that Spradlin personally used a dangerous and deadly weapon during the commission of a crime. The trial court granted the motion.

II. DISCUSSION

As noted above, we requested supplemental briefing from the parties as to whether the trial court erred in light of *Dueñas*, *supra*, 30 Cal.App.5th 1157, by imposing restitution fines and fees without having first ascertained whether Spradlin had an ability to pay them. In *Dueñas*, a case in which the defendant objected at sentencing to the trial court's imposition of fines and fees, the Court of Appeal held that "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373." (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1164.) The court also held that "although Penal Code section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Ibid.*)

In his supplemental briefing, Spradlin argues that the trial court erred under *Dueñas* and the case should be remanded so that the trial court can make an ability-to-pay determination. Spradlin acknowledges that his trial counsel's failure to object may result in forfeiture of appellate review. Spradlin argues, however, that *Dueñas* "constitutes a major shift in the law" and "nothing in the law provided defense counsel with a legal basis for seeking an ability to pay hearing on [Spradlin's] behalf."

The Attorney General argues that Spradlin's case differs from *Dueñas* in two ways. First, Spradlin did not raise a constitutional challenge at sentencing to the imposition of his fines and fees and did not assert that he would be unable to pay them.

Secondly, the record does not establish Spradlin's inability to pay, and his ability to pay can be presumed from his capacity to earn wages in prison.³

Based on our review of the record and supplemental briefing, we conclude that Spradlin has forfeited any claim of error concerning the trial court's failure to determine his ability to pay the restitution fines and fees. As the California Supreme Court has repeatedly held, a defendant's failure to object to the imposition of fines and fees at sentencing constitutes a forfeiture of the right to challenge those fines and fees on appeal. (See, e.g., *People v. Aguilar* (2015) 60 Cal.4th 862, 864 [applying the forfeiture rule to challenges to probation-related costs and an order for reimbursement of fees paid to appointed trial counsel]; *People v. Trujillo* (2015) 60 Cal.4th 850, 853–854 [applying the forfeiture rule to an unpreserved claim regarding probation-related fees and defendant's inability to pay them]; *People v. McCullough* (2013) 56 Cal.4th 589, 596–597 [holding that a defendant forfeits an appellate challenge to the sufficiency of evidence supporting a jail booking fee if the fee is not first challenged in the trial court]; *People v. Nelson* (2011) 51 Cal.4th 198, 227 [defendant's claim that the trial court erred by failing to consider ability to pay a restitution fine is forfeited by the failure to object]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [rejecting defendant's argument that he was exempted from the forfeiture rule because his restitution fine amounted to an unauthorized sentence based on his inability to pay].)

We are not persuaded that Spradlin's failure to challenge the constitutionality of imposing fines and fees without considering his ability to pay is excepted from the forfeiture rule. Although an unforeseen significant change in law is a recognized exception to the contemporaneous objection requirement (see *People v. Black* (2007) 41

³ In his reply, Spradlin counters that paid work in prison is not guaranteed to inmates and the prosecution should bear the burden of showing that Spradlin has the ability to pay the fines and fees.

Cal.4th 799, 810–812), that exception does not apply here. The arguments and holdings in *Dueñas* are grounded in longstanding due process principles and precedent. (See *Dueñas*, *supra*, 30 Cal.App.5th at pp. 1168–1169, 1171 [relying on *Griffin v. Illinois* (1956) 351 U.S. 12, *In re Antazo* (1970) 3 Cal.3d 100, and *Bearden v. Georgia* (1983) 461 U.S. 660].)

The court in *Dueñas* did not purport to reject or depart from precedent in reaching its conclusions. In addition, the court noted recent decisions that demonstrate a trend toward protecting indigent persons from the disproportionate effects of governmental fees. (See *Dueñas*, *supra*, 30 Cal.App.5th at pp. 1168–1169 [citing *People v. Neal* (2018) 29 Cal.App.5th 820 and *Jameson v. Desta* (2018) 5 Cal.5th 594].) For these reasons, we conclude that *Dueñas* did not work an unforeseeable change that was “wholly unsupported by substantive law then in existence.” (*People v. Welch* (1993) 5 Cal.4th 228, 237.) Trial counsel’s failure to object at Spradlin’s sentencing hearing forfeited Spradlin’s right to challenge on appeal the fines and fees imposed by the trial court.

III. DISPOSITION

The judgment is affirmed.

DANNER, J.

I CONCUR:

GROVER, J.

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Greenwood, P.J., concurring

I concur with the disposition in the majority opinion, but I respectfully disagree that Spradlin forfeited his claim under *People v. Dueñas* (2019) 30 Cal.App.5th 1557 (*Dueñas*) by failing to object below. In my view, Spradlin did not forfeit his claim because *Dueñas* had not been decided at the time of his sentencing, and the claim is based on a newly announced constitutional principle that trial counsel could not have reasonably anticipated. (*People v. Castellano* (Mar. 26, 2019, B286317) __Cal.App.5th __ [2019 WL 1349472] (*Castellano*).)

In *Dueñas*, the Court of Appeal for the Second District held it violated due process under both the United States and California Constitutions to impose certain fines and fees without first determining the defendant's ability to pay. (*Dueñas, supra*, 30 Cal.App.5th at p. 242.) We requested supplemental briefing on whether the trial court in Spradlin's case similarly erred in its imposition of fines and fees without determining his ability to pay. Spradlin argued that it did, and the Attorney General argued that Spradlin forfeited the claim by failing to object below. The majority agrees with the Attorney General, reasoning that the holdings of *Dueñas* are grounded in longstanding due process principles and precedent.

I respectfully disagree. I recognize that failure to object to imposition of fines and fees generally constitutes forfeiture of the claim on appeal. (*People v. Aguilar* (2015) 60 Cal.4th 862, 864.) But the forfeiture rule does not apply “ ‘when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change.’ [Citations.]” (*People v. Black* (2007) 41 Cal.4th 799, 810.) That exception should apply here. “No court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay. Moreover, none of the statutes authorizing the imposition of the fines, fees or assessments at issue authorized the court's consideration of a defendant's ability to pay. [. . .] When, as here, the defendant's challenge on direct

appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture.” (*Castellano* at *5.) Given that fines and fees imposed here were mandated by statute, I have no doubt that an objection would have been futile. (See *People v. Welch* (1993) 5 Cal.4th 228, 237 [reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile].)

Accordingly, I would consider the merits of Spradlin’s claim under *Dueñas*. I would further conclude, however, that we must affirm the judgment because the record shows Spradlin—who is serving a term of 25 years to life in state prison—has the ability to pay. (See *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 [ability to pay includes a defendant’s ability to obtain prison wages].)

Greenwood, P.J.